

BRIEF SUMMARY OF IMPACT OF SIMPLEX V. NEWINGTON
Prepared for Strafford Regional Planning Commission
March 12, 2001

By Peter J. Loughlin

In his October 1992 dissenting opinion in *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 246, Justice Sherman Horton stated: "I would ask for a full reconsideration of our definition of hardship, in the appropriate case...." Justice Horton determined that the appropriate case to reconsider the definition of unnecessary hardship was the otherwise unremarkable case of *Simplex v. Newington*. On January 29, 2001, the New Hampshire Supreme Court signaled a new tact on the subject of unnecessary hardship when it stated as follows:

We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property.

The Supreme Court's decision represents a significant change in the law regarding variances, however, contrary to some speculation, it did not reverse the entire body of variance law that has been developing over the last 50 years. Rather, it represents the latest stage in the continuing evolution of this one particular aspect of zoning law. Much of the law regarding variances remains unchanged. The following is a summary of the impact of the *Simplex* decision.

**I. ASPECTS OF VARIANCE LAW NOT CHANGED BY
SIMPLEX V. NEWINGTON**

A. Purpose of Variances: The reason why variances are part of the law of zoning remains unchanged. "Variances are included in a zoning ordinance to prevent an ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated." *Ouimette v. City of Somersworth*, 119 N.H. 292, 294 (1979). Variances are designed to afford relief to individual properties peculiarly affected by the provisions of a zoning ordinance. If the majority of property in a particular zoning district are affected in the same way, the appropriate form of relief is a legislative change (zoning amendment) rather than a variance. *Rowe v. Town of North Hampton*, 131 N.H. 424, 429 (1989).

B. Burden of Proof: The parties seeking a variance continue to have the burden of establishing each of the requirements for that variance. *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 243 (1992).

C. Presumption of Validity: There continues to be a presumption that all zoning ordinances are valid, and the party challenging their constitutionality carries the burden of overcoming this presumption. *Town of Nottingham v. Harvey*, 120 N.H. 889, 892 (1980). To determine whether an ordinance is arbitrary and unreasonable, the injury or loss to the landowner must be balanced against the gain to the public. *Metzger v. Town of Brentwood*, 117 N.H. 497, 501 (1977). Reasonable zoning regulations that limit economic uses of property, but do not “substantially destroy” the value of an individual piece of property, are constitutional. In determining whether a regulation has substantially destroyed the value of a particular parcel, it is necessary whether the property at issue is zoned in conformity with the uses that surround it, and whether these uses are uniform. That is, the uses of adjacent properties may render the value of the subject property so small as to effect the taking of the property, if the zoning ordinance is enforced. *Carbonneau v. Town of Exeter*, 119 N.H. 259, 264 (1979); *Buskey v. Town of Hanover*, 133 N.H. 318, 324 (1990).

D. Financial Hardship Not Enough: The law regarding financial hardship remains the same. The fact that the application of an ordinance may cause a landowner to suffer some financial loss is not (by itself) sufficient to create an unnecessary hardship. *Governor’s Island Club v. Town of Gilford*, 124 N.H. 126, 130 (1983); *Olszak v. Town of New Hampton*, 139 N.H. 723, 726 (1995).

E. Personal Circumstances of Owner: A hardship does not exist if it just relates to the personal circumstances of the landowner. *Ryan v. City of Manchester*, 123 N.H. 170, 174 (1983) (health problems which prevented landowner from working outside her home did not justify variance for business in home in residential district).

F. Necessary Hardship: Variances may still be granted only if the application of an ordinance creates an “unnecessary hardship.” All land use regulations may cause hardship to a landowner. The hardship may be considered “necessary” if it affords commensurate public advantage and is required in order to give full effect to the purposes of the ordinance. *Grey Rocks (dissent p 247)*

II. THE STATUTE AUTHORIZING VARIANCES

The New Hampshire Supreme Court created the definition of unnecessary hardship for this State and the Supreme Court has now redefined it. The standard zoning enabling legislation adopted by the New Hampshire Legislature in 1925 spells out the basic requirements for a variance and those requirements cannot be changed by the Court. RSA 674:33, I(b) provides that the Zoning Board of Adjustments shall have the power to:

Authorize upon appeal in specific cases such variance from the terms of the zoning ordinance as will not be contrary to the public interest, if, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

III. REQUIREMENTS THAT CONTINUE TO EXIST IN ORDER FOR A VARIANCE TO BE GRANTED

A. No Diminution in Value: Even under the new standard, the granting of a variance cannot result in the diminution of value of surrounding properties. This continues to be a judgment call from the ZBA and often requires the ZBA to weigh conflicting testimony and opinions. The Courts have recognized that the Zoning Board of Adjustment is an appropriate body to resolve conflicts in testimony. *Nestor v. Town of Meredith ZBA*, 138 N.H. 632 (1994).

The fact that neighbors may not object does not necessarily mean that the proposal will not cause a diminution in value and, on the other hand, the fact that neighbors might prefer that a particular parcel of land remain undeveloped is not, by itself, a basis for finding that there would be a diminution. (The requirement that there be no diminution in value was added by the New Hampshire Supreme Court 50 years ago and was reiterated by the Court in *Simplex*).

B. Public Interest: The statutory requirement remains the same that the variance cannot be contrary to the public interest. Like the question of effect on property values, this is a judgment call for the ZBA and one where the ZBA must resolve all conflicts in testimony. *Nestor v. Town of Meredith ZBA*, 138 N.H. 632 (1994). "A finding that an unnecessary hardship exists does not necessarily require the granting of a variance; rather the Zoning Board is required to balance such a hardship with considerations such as public interest." *Saturley v. Town of Hollis*, 129 N.H. 757, 761 (1987) (special conditions about the property distinguished it from other properties in the area, however, the denial of a variance for the location of a septic system was upheld because it was found that the placement of a septic system in the requested location could have an adverse impact on the public water supply and thus on the public interest).

C. Substantial Justice: The requirement that the granting of a variance will result in substantial justice remains in place. The Office of State Planning instructional booklet on zoning has always taken the position that the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. A Board of Adjustment cannot alleviate an injustice by granting an illegal variance. This particular requirement overlaps somewhat with the new requirement for unnecessary hardship.

D. Spirit and Intent: The use resulting from the variance must not be contrary to the spirit and intent of the ordinance. This requirement remains unchanged, however, like the previous requirement, there is now some overlapping between this requirement and the new standard for unnecessary hardship. The example given in the OSP Handbook is of a lot which has ample width but narrows down in the front and does not meet the minimum frontage requirement. If the intent of the frontage requirement was to prevent overcrowding and since the width of the lot would ensure that there would be no overcrowding, the granting of a variance in that instance would not violate the spirit and intent of the ordinance. See *e.g. Metzger v. Brentwood*, 117 N.H. 497 (1997).

IV. THERE MUST BE SPECIAL CONDITIONS RELATED TO THE PROPERTY THAT IS THE SUBJECT OF THE VARIANCE APPLICATION

The requirements regarding *special conditions* have not changed and must be kept in mind when applying the new standard for hardship. The statute allows the granting of a variance only when “owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship.” Unless there are special conditions regarding a particular piece of property that cause the ordinance to result in unnecessary hardship, a variance cannot be granted. Examples of “special conditions” might be where an unusual shape of a lot causes the setback requirements to eliminate any reasonable building envelope, *Husnander v. Town of Barnstead*, 139 N.H. 476 (1995) (banana shaped building envelope unusable without relief), or where all other lots enjoyed the benefits sought by applicant. *Belanger v. Nashua*, 121 N.H. 389 (1981) (most other lots had commercial uses).

If all other lots in the zoning district are similarly affected by the zoning ordinance so that there are no “special conditions” affecting the lot of the applicant, the applicant is not entitled to variance relief. *Hanson v. Manning*, 115 N.H. 367 (1970) (“Absent ‘special conditions’ which distinguish the property from other property in the area, no variance may be granted even though there is hardship.” p 369 - applicant had 130 acres characterized by ledge and wetlands just like every other parcel in that portion of the Town); *Crossley v. Town of Pelham*, 133 N.H. 215 (1990) (200 of applicants’ neighbors had homes also on undersized lots which could not accommodate a two car garage without variance relief).

V. WHAT *SIMPLEX V. NEWINGTON* HAS CHANGED

Simplex v. Newington has not turned zoning law, or for that matter all variance law, on its ear. It does, however, reflect two significant changes: (1) it signals the New Hampshire Supreme Court’s changing attitude toward private property rights and the granting of variance relief, and (2) it explicitly marks the change in the Court developed definition of “unnecessary hardship.”

The Change In The Court's Attitude

Before *Simplex*: Between 1987 and 1992, the Court took a very hard line on variances. In each of ten cases decided during that time period, the Court ruled that variances should not have been granted.

Alexander v. Hampstead, 129 N.H. 278 (1987); *Saturley v. Hollis ZBA*, 129 N.H. 757 (1987); *Margate v. Gilford*, 130 N.H. 91 (1987); *Rowe v. North Hampton*, 131 N.H. 424 (1989); *Goslin v. Farmington*, 132 N.H. 48 (1989); *Devaney v. Windham*, 132 N.H. 302 (1989); *Crossley v. Pelham*, 133 N.H. 215 (1990); *Granite State Minerals v. Portsmouth*, 134 N.H. 408 (1991); *Hussey v. Barrington*, 135 N.H. 227 (1992) and *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239 (1992). [Two other variance cases were considered and decided on other issues: *Treisman v. Bedford*, 132 N.H. 54 (1989); *Tessier v. Hudson*, 135 N.H. 168 (1991)];

After the flood of strict variance cases in the late 1980's and early 1990's, there appears to have been an almost imperceptible change in the Court's attitude toward variances. From 1992 to 2000, the Court considered very few variance cases. In *Husnander v. Town of Barnstead*, 130 N.H. 476 (1995), the Court upheld the granting of a variance for an unusually shaped parcel of land and in *Ray's State Line Market v. Town of Pelham*, 140 N.H. 139 (1995), the Court upheld the expansion of a nonconforming use although it did not require a variance. Nonetheless, until the decision in *Simplex*, the almost impossible standards for unnecessary hardship do not apply.

After *Simplex*: Just how far the Court's attitude concerning unnecessary hardship will evolve remains to be seen. The clear thrust of the Court's thinking at the present time is summarized in the following paragraph from the *Simplex* decision:

Inevitably and necessarily, there is a tension between zoning ordinances and property rights, as Courts balance the rights of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions. The New Hampshire Constitution guarantees to all persons the right to acquire, possess and protect property. *See N.H. Const pt I, arts. 2, 12*. These guarantees limit all grants of powers to the State that deprive individuals of the reasonable use of their land.

In short, rather than routinely finding that the difficult conditions for variances have not been met, the Court will now be much more inclined to try to attempt to strike a balance between municipal regulations and private property rights, with the scales probably being tilted toward private property rights.

VI. THE OLD UNNECESSARY HARDSHIP TEST (PRE-SIMPLEX)

In *Ryan v. City of Manchester Zoning Board*, 123 N.H. 170, 173 (1983), the New Hampshire Supreme Court stated as follows:

It is well established that a hardship exists only if the ordinance unduly restricts the use of the land due to special conditions unique to that particular parcel of land. *Richardson v. Town of Salisbury*, 123 N.H. 93, 96 (1983); *U-Haul Co. of NH & Vermont, Inc. v. City of Concord*, 122 N.H. 910, 912 (1982). The hardship must arise from a special condition of the land which distinguishes it from other land in the same area with respect to the suitability for the use for which it is zoned.

The pre-*Governor's Island Club v. Gilford*, 124 N.H. 126 (1983) definition of unnecessary hardship which was outlined in *Ryan* may still have some validity. It was the ratcheting up of the restrictions that began with *Governor's Island* that made variances virtually impossible to obtain and which eventually led to the *Simplex* case. The rule in *Governor's Island* and *Grey Rocks* was stated as follows:

The standard for establishing hardship is narrow. For hardship to exist under our test, the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land.

This portion of the test is no longer valid since the Court has found that that effectively shut off the relief valve that variances are supposed to provide.

VII. THE NEW UNNECESSARY HARDSHIP TEST (POST-SIMPLEX)

Rather than having to establish that the ordinance prevents the owner from making *any reasonable use of the land* in order to demonstrate unnecessary hardship, a landowner can now establish unnecessary hardship by satisfying the following three conditions:

(1) *The zoning restriction as applied to the applicant's property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment*

Rather than having to demonstrate that there is not any reasonable use of the land, landowners must now demonstrate that the restriction interferes with their reasonable use of the property considering its unique setting. The use must be reasonable. The second part of this test is in

some ways a restatement of the statutory requirement that there be something unique about this property and that it not share the same characteristics of every other property in the zoning district

(2) No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property.

Is the restriction on the property necessary in order to give full effect to the purpose of the ordinance, or can relief be granted to this property without frustrating the purpose of the ordinance? Is the full application of the ordinance to this particular property necessary to promote a valid public purpose?

(3) The variance would not injure the public or private rights of others.

This is perhaps similar to a “no harm - no foul” standard. If the granting of the variance would not have any negative impact on the public or on private persons, then perhaps this condition is met. Stated differently, would the granting of the variance create a private or public nuisance?

All three conditions must be satisfied for unnecessary hardship to exist under this standard.

VIII. IMPACT OF *SIMPLEX V. NEWINGTON*

We will probably not know the real effect of *Simplex v. Newington* until a number of years have passed and the Supreme Court has issued two or three more decisions interpreting the new standard. We can, at this point, fairly safely say that the case will have the following effects:

Less Certainty/More Flexibility: Under the old standard, the requirement for unnecessary hardship was very difficult. After *Governor’s Island*, it had become almost impossible. On the positive side, there was a great deal of certainty in dealing with

* A nuisance arises from use of property, either actively or passively, in an unreasonable manner. *Shea v. Portsmouth*, 98 N.H. 22 (1953). A nuisance can be either public or private. A private nuisance is defined as an activity which results in an unreasonable interference with the use and enjoyment of another’s property, *Urie v. Laconia Paper Co.*, 107 N.H. 131 (1966); while a public nuisance is an unreasonable interference with a right common to the general public. A public nuisance is behavior which unreasonably interferes with the health, safety, peace, comfort or convenience of the general community. Conduct which unreasonably interferes with the rights of others may be both a public and private nuisance. *Robie v. Lillis*, 112 N.H. 492 (1972). In order for a nuisance to exist, the interference complained of must be substantial, that is, the harm alleged must be in excess of the customary interference a land user suffers in an organized society, however, not every intentional and substantial invasion of a person’s interest in the use and enjoyment of land is actionable. *Id.* at 496.

variance applications. On the negative side, the variance process no longer provided the relief valve which was the intent of the drafters of the Standard Zoning Enabling Act in the 1920s. The old standard was relatively easy to apply. The new standard has a great deal more flexibility and will require deliberation and the exercise of judgment in cases which may have resulted in a denial in the past.

Less Leverage for Bad Neighbor: One of the unfortunate bi-products of the old test for unnecessary hardship was that it gave undue leverage to a difficult neighbor. While the rights of abutters need to be protected, the old test permitted difficult neighbors to prevent the issuance of variances when there was basically no other reason for denial than the fact that a neighbor wanted to be difficult.

Making Honest ZBA Members: In the June, 1993 edition of the New Hampshire Bar Journal, Attorney David Kent of Plymouth, New Hampshire, authored an article in which he compiled the results of a study of five Boards of Adjustment throughout the State. The results of his findings indicated that 70% of all requested variances were granted. When there was significant opposition, the percentage dropped greatly.

The reality was that despite the almost impossible requirements for unnecessary hardship, members of Boards of Adjustment have generally tried to balance the public good with the rights of private individuals, be they the applicant or abutters. Although there were exceptions, Boards of Adjustment were not reckless in denying or granting variances. Board members wrestled with each of the conditions. The unnecessary hardship requirement caused the most consternation for Board members.

There will probably be a marginal increase in the number of variances that are granted, however, the major difference will be that the Boards of Adjustment will now have a mechanism whereby they can legitimately grant relief when they find that the conditions are met and that it is appropriate.

IX. WHAT SHOULD MUNICIPALITIES DO ?

A. Change Variance Application: If your variance application discusses the unnecessary hardship under the old standard, it should be revised to reflect the new standard.

B. Seek Guidance: If a variance application raises serious questions about the purpose or application of the Zoning Ordinance as applied to a particular piece of property, you may want to seek assistance from Town Counsel or, more importantly, the municipal or regional planning office.

C. Master Plan: Since the test now focuses on the impact of the application on the ordinance, it is even more important to consider the relationship between the Zoning Ordinance and the Master Plan.

D. Making Findings: The change in the zoning requirement makes it even more important that boards make accurate findings of fact in regards to all the tests for a variance.

E. Keep Ordinance Current: The new standard established by *Simplex* for determining unnecessary hardship puts an even greater premium on keeping zoning ordinances current.

Respectfully submitted,

Peter J. Loughlin

Leonard Cotton House ? Strawberry Banke
Post Office Box 1111
Portsmouth, NH 03802-1111
Phone: (603) 431-6466
Fax: (603) 436-4079
E-mail: loughlin@nh.ultranet.com